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Steel Erection & Riggin Co. and The State Insurance Fund v. Industrial Commission and Jeanette T. Dahle : Plaintiff's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF
THE STATE OF UTAH

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OCT 24 1963

STEEL ERECTION & RIGGING
COMPANY and THE STATE
INSURANCE FUND,

Clerk, Supreme Court, Utah

Plaintiffs

vs.

INDUSTRIAL COMMISSION and
JEANETTE T. DAHLE, widow of
William E. Dahle, deceased,

Defendants

Case No.

9967

PLAINTIFF'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

STEEL ERECTION & RIGGING
COMPANY and THE STATE
INSURANCE FUND,

Plaintiffs

vs.

INDUSTRIAL COMMISSION and
JEANETTE T. DAHLE, widow of
William E. Dahle, deceased,

Defendants

Case No.
9967

PLAINTIFF'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a proceeding for compensation under the Workman's Compensation Act of the State of Utah by Jeanette T. Dahle, widow of William E. Dahle, for and on behalf of herself and two children as dependants of William E. Dahle, against Steel Erection & Rigging Company, the employer of the deceased, and the State Insurance Fund, its insurance carrier. It is claimed by the Defendant, Jeanette T. Dahle that the death of her husband arose out of, and was the result of an injury

sustained in the course of the deceased's employment by Plaintiff, Steel Erection & Rigging Company.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

The case was heard before Commissioner, Otto A. Wiesley, sitting as referee. The original hearing was held on January 14th, 1963 and a further hearing was held on March 20th, 1963. The Commission found "that the death of William E. Dahle was the result of the accident which occurred on March 23rd, 1961". It further found that Jeanette T. Dahle was the widow of the deceased and was wholly dependent upon him for support as were two children, Phyllis G. Dahle and Steven D. Dahle.

The Plaintiffs seek a review of the Commission's Order finding and concluding that the death of William E. Dahle was a result of the accident of March 23rd, 1961, and of the Commission's Order denying the Plaintiff's Application for a rehearing.

RELIEF SOUGHT ON REVIEW

The Plaintiffs seek to have the Orders of the Commission set aside, insofar as they determined that the accident of March 23rd, 1961 was the cause of death of William E. Dahle.

Plaintiffs do not deny that an accident occurred or that deceased was injured on that date, but do deny that the injuries sustained at that time caused the death.

In addition Plaintiffs do not take exception to the finding of the Commission as to dependency.

STATEMENT OF FACTS

On March 23rd, 1961, William E. Dahle was an employee of Steel Erection & Rigging Company. He sustained an injury when a scaffold on which he was working broke causing him to fall, striking his right ankle and head on a concrete pier. (R. 1-2) Doctor Silas S. Smith was the initial attending physician. He diagnosed the injuries as follows: "(1) Contusion right chest and back severe. (2) Fracture 10th rib right. (3) Sprain back lumbar area." (R. 3) Thereafter because deceased was suffering from headaches he was seen in consultation at the request of Doctor Silas Smith by Doctor J. Louis Schricker, Jr., a neurosurgeon. "On May the 4th, 1961 billateral drill openings were performed and evacuation of subdural hemotomas, bilaterally carried out." (R. 5)

Doctor Schricker reported that his post-operative course was uneventful and that he was discharged on May 13th, 1961. (R. 5) Dahle was again seen by Doctor Schricker on May 17th, 1961, for recheck examination "at which time the examination was essentially normal and he had made a good recovery. He was told he could return to work July 1st, 1961." (R. 5)

On June 24th, 1961, Dahle reported to Doctor Smith for a further examination at which time Doctor Smith found "he had swollen ankles and ascitis and other symptoms of cardiac decompensation. He was having difficulty in coordinating his movements and his mental processes. His speech was also slurred." Doctor Smith concluded that Mr. Dahle was not able to return to work and that

his disability continued and that the disability was permanent and total. (R. 6) Dahle had a pre-existing cardiac heart condition, but had been able to work and Dr. Viko reported that "If the heart was the only thing to be considered, it is possible that he could return to supervisory work of the nature he had done before." (R. 9) Doctor J. Louis Schricker, Jr., reported on August 29th that he had again seen Mr. Dahle and at that time he was totally disabled because of a "severe right hemiparesis" (R. 11) which is a muscular weakness. On October 11th, 1961, Doctor Schricker reported "It is my impression that Mr. Dahle is showing evidence of a post-traumatic cerebral thrombosis involving the vessels of the left hemisphere of the brain, the etiological factor being the trauma and subsequent hematoma on the left. He is totally and permanently disabled." (R. 12)

The State Insurance Fund initially assumed liability for the fall and agreed that the deceased sustained an injury by accident arising out of or in the course of his employment. (R. 48) Compensation was paid by the State Fund to and including July 19th, 1963 according to the application. (R. 13 and R. 44) However, compensation was in fact paid to June 30th, 1961. At that time because of not being able to connect the condition of Dahle with the accident of March 23rd, 1961, the payment of compensation was discontinued. Dahle filed an Employee's Application for Hearing to Settle Industrial Accident Claim on October 20th, 1961. (R. 13) Because of medical questions involved the State Insurance Fund denied liability on November 20th, 1961. (R. 14)

The Industrial Commission by its Order dated November 27th, 1961, (R. 16) referred the medical aspects of the claim of the Applicant to a medical panel, for investigation. The panel consisted of L. E. Viko, M.D., Chairman, J. L. Schricker, M.D., Chester Powell, M.D., W. M. Hebertson, M.D., Hans Hecht, M.D. Before the Panel could submit its report, William E. Dahle died, his death occurring on December 30th, 1961. An autopsy was performed on that same day (R. 17-23)

On March 30th, 1962 the Medical Panel submitted its report to the Industrial Commission. The concluding paragraph of which is as follows:

“The panel regrets that it is not able to establish the cause of his neurologic disease and therefore is not able to affirm or deny a relation to the accident of such neurologic disease. In the light of the evidence before this Panel, we cannot offer even a reasonable probable explanation of the neurologic disease, nor of any possible relationship to the accident.” (R. 40)

Jeanette T. Dahle, widow of the deceased, filed objections to the report of the medical panel on April 23rd, 1962, (R. 42) On September 25th, 1962 Jeanette T. Dahle, dependant widow of William E. Dahle, filed a Dependant's Application for Hearing to Settle Industrial Accident Claim.” (R. 44) The State Insurance Fund denied liability. (R. 45) The hearing on the Applications was held on January 14th, 1963. (R. 47) A further hearing was held on March 20th, 1963. (R. 65) Following the hearings the Industrial Commission found in favor of the Applicant (R. 88-89) and on July 3rd,

1963, denied the Application for rehearing filed by the Plaintiff, State Insurance Fund. (R. 91)

ARGUMENT

POINT I

THE MEDICAL PANEL APPOINTED PRIOR TO THE HEARINGS COULD NOT AFFIRM OR DENY THAT THE ACCIDENT WAS THE CAUSE OF DEATH.

It is admitted by Plaintiffs that William E. Dahle, deceased, was an employee of Steel Erection and Rigging Company and that he sustained an injury arising out of or in the course of his employment on March 23rd, 1961. (R. 1-2) Dahle received some ascertainable injuries as the result of his fall. Compensation was paid by the State Insurance Fund from the time of the injury until June 30th, 1961. (R. 13) In the meantime, Dr. Silas S. Smith, the attending physician, (R. 3) referred his patient to Dr. J. Louis Schricker, Jr. a neurosurgeon. This referral was because of headaches suffered by Dahle. Doctor Schricker's report (R. 5) advised that after 'the bilateral drill openings were performed and the evacuation of subdural hematomas bilaterally' were carried out that the post operative course was uneventful. About two weeks later Dahle was again seen by Doctor Schricker for a recheck examination, who reported that he could return to work on July 1st, 1961. (R. 5) It was following this optimistic report that Dahle's condition changed and his condition apparently deteriorated from that time on. Doctor Schricker reported on August 3rd, 1961 that

Dahle had developed cardiac difficulties which at that time rendered him totally incapacitated. (R. 7) He had a heart attack in 1952 (R. 8) A deteriorating neurologic condition developed, resulting in total disability because of a severe, right hemiparesis. (R. 11)

Further liability was denied and the payment of compensation terminated by the State Insurance Fund, because the medical problems presented made it impossible to determine whether the neurologic condition was the result of or was aggravated by the accident of March 23, 1961, or whether it was the result of some entirely independent cause.

Following the filing of an Application for a hearing by Dahle (R. 13) the State Insurance Fund denied liability, and in so doing, informed the Industrial Commission that it considered that the case involved medical questions. (R. 14)

Section 35-1-77, Utah Code Annotated provides as follows:

“Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the Commission shall refer the medical aspects of the case to a Medical Panel appointed by the Commission”

Following the denial by the State Insurance Fund, and in conformance with the statute, the Commission appointed a Medical Panel. (R. 16) Before the Panel could complete its study Dahle died. After a considerable

period of deliberation, including a study of the autopsy report, the Panel submitted its report to the Commission. (R. 37-40)

The Panel's report concludes as follows: (R. 39-38)

"The panel can therefore neither affirm nor deny the following possibilities:

"1. Hemiparesis arising as a complicating factor secondary to the subdural hematoma, presumably due to trauma incurred in the accident.

"2. Cerebral complications arising from thrombotic embolic phenomena associated with the severe rheumatic valvular disease and mitral stenosis.

"3. Unrelated cerebral disease, such as neoplasm, degenerative process, encephalitis, or other pathologic process not related to trauma or cardiac disease as a cause of the right hemiparesis.

"POSSIBLE RELATIONS BETWEEN HEART AND NEUROLOGIC DISEASE.

"His heart disease with congestive failure would be expected to impair cerebral circulation and thereby aggravating his neurologic disease, whatever its cause. The physical exertion involved in this hemiplegic individual to carry on even the lightest activities of a restricted life, might reasonably be expected to aggravate a heart condition. The heart condition, of course, was not due to the accident, since it had the obvious rheumatic etiology and was of longstanding.

"The Panel regrets that it is not able to establish the cause of his neurologic disease and therefore is not able to affirm or deny a relation to the accident of such neurologic disease. In the light of the evidence before

this panel, we cannot offer even a reasonable explanation of the neurologic disease, nor of any possible relationship to the accident."

POINT II

THE CONTROVERTED MEDICAL QUESTION SHOULD HAVE BEEN REFERRED TO THE MEDICAL PANEL AFTER THE HEARINGS.

Objections were filed to the Medical Panel Report by the Defendant, Jeanette T. Dahle. (R. 42) In accordance with the statute the Commission set the matter down for hearing for hearing for the 14th day of January of 1963. (R. 47)

It is important to note that the Medical Panel appointed by the Commission consisted of L. E. Viko, M.D., Chairman, J. L. Schricker, M.D., Chester Powell, M.D. W. M. Hebertson, M. D. and Hans Hecht, M.D. (R. 16) Two members of the Panel were doctors who had during the deceased's illness either examined him or had operated upon him. Dr. Viko had given him a physical examination (R. 8) and Dr. Schricker had operated upon him and had examined him several times subsequent to that time. (R. 5, 7, 11, 12) Dr. Viko, the Chairman of the Medical Panel was called as a witness and testified after identifying the Report that he was of the same opinion with respect to the medical issues as he was at the time he signed the Report. (R. 50)

On cross-examination by Mr. Kennard, counsel for Defendant, Jeanette T. Dahle, Doctor Viko testified as follows: (R. 53-54)

“Q. In this case, the autopsy did no good, as far as establishing what caused the death; is that correct?”

A. No. Except, of course, it did disclose a heart condition. It did no good as far as the neurologic condition went, but it established completely the heart condition.

Q. But as far as the cause of death, it did not establish that, did it?

A. To this extent. It showed there was a severe enough heart disease that the heart disease itself could have caused death, without any neurologic lesion.

Q. But the opinion of the panel was that that could have been in error, or else something might have been shown which could have led to another finding?

A. The three neurologists felt that this was almost unheard of. That with the symptoms he had, and the findings he had on examination, it was almost unheard of that the autopsy wouldn't reveal the answers. They felt it was almost unheard of, and they could not explain it.

Q. Now there is a possibility — or more than a possibility, a probability — in the minds of the panel that this autopsy was in error, was there not?

A. Not in error, but unrevealing. And that there was a possibility, not a probability, that further microscopic study by the expert that we sent it to might find something that hadn't been found here.

Q. Leaving the Board in doubt as to the real cause of the death? Correct?

A. Not so much that. We felt that there was sufficient heart disease to cause death, but in doubt as to the relation of two things. The cause of the neurologic signs and symptoms, the disability — he had almost total disability from his neurologic things, entirely aside from the heart — and whether that neurologic disability was related solely to the heart by embolism, or whether it was related to the accident by trauma to the brain. That was where the doubt existed, which the autopsy failed to answer.

Q. Realizing then, as the Board did, that the heart condition could have been aggravated by the trauma and the neurological condition; is that correct?

A. That was stated in the report?"

Section 35-1-77 Utah Code Annotated, which provides for the Medical Panel sets forth the following procedure to be followed in the event an objection to the Medical Panel's report is made.

"Upon such hearing the written report of the Panel may be received as an exhibit, but shall not be considered as evidence in the case, except in so far as it is sustained by the testimony admitted."

In the case entitled, *Hackford vs. Industrial Commission*, 11 Utah 2nd 312, 358 P2nd, 899, at page 314, this Court said:

"The Panel report, and its use as evidence, is governed by statute. Inasmuch as the Plaintiff has filed his written objections to the report of the panel, the burden was upon the Commission or the employer to sustain it by testimony at the hearing."

In the present case, the findings of the Medical Panel were sustained by the oral testimony of Doctor J. L. Viko and was, therefore, evidence to be considered by the Commission.

At the close of the first hearing, the Defendant's attorney requested that another hearing be set so that Doctor Silas Smith might testify. (R. 63) This further hearing was held on March the 20th, 1963 at which time Doctor Silas S. Smith testified on behalf of the Defendant. Doctor Smith is a surgeon. (R. 67) He does not profess to be a neurologist or a heart specialist. He was the attending doctor. During the course of the examination, Doctor Smith expressed the opinion that Dahle's condition was secondary to his fall (R. 73) and he was asked the question:

Q. Does this constitute evidence of a cerebral laceration, or hemorrhage, Doctor?

A. It could. I'll put it that way. It could indicate that. (R. 74)

The Industrial Commission made and entered its Order after the second hearing, (R. 88-89) and in commenting upon the testimony of Doctor Smith, the Order states:

"The Panel, consisting of Doctors Viko, Schricker, Powell, Hebertson, and Hecht, after two long meetings, filed an unanimous report which neither affirms nor denies that the accident of March the 23rd, 1961 caused the death of William E. Dahle. The testimony of the attending physician, Doctor Silas S. Smith, given at the second hearing is in no respect contradictory to

the splendid report of the Medical Panel. We believe that his testimony does provide the answer. He stated that the decedent suffered a brain laceration as a result of the fall which caused a hemiplegia of the right side which eventually caused his death. We also believe that the hemiplegia was instrumental in the more rapid deterioration of the preexisting heart problem, and therefore, did contribute to death."

The Order of the Industrial Commission was given immediately following the second hearing and without again referring the medical aspects of this claim to a Medical Panel.

As set forth above, Section 35-1-77 provides as follows:

"Upon the filing of the claim for compensation for injury by accident, or for death, arising out of or in the course of his employment, and where the employer or insurance carrier denies liability, the Commission shall refer the medical aspects of the case to a Medical Panel appointed by the Commission."

It should be noted that the statute provides that:

"The Commission shall refer the medical aspects of the case to a medical panel." emphasis ours.

The matter of referral of controverted medical questions, to a Medical Panel appears to be clearly the duty of the Commission, and should be done on the Commission's own volition. In this case, the Commission did appoint a Medical Panel, but it was appointed prior to

the two hearings. The findings of the Medical Panel, were to the effect that they could come to no conclusion, that is, the Panel could neither affirm nor deny that the accident of March the 23rd 1961 caused the death of the deceased. The Defendant objected to the findings of the Medical Panel and in so doing controverted the findings of the Medical Panel which was composed of experts, specialists in the field of neurology and heart problems. The Panel included two physicians who had previously examined or cared for the deceased. The only testimony, which was presented at either hearing which goes to the real issue involved in this case, that is the issue as to whether or not the fall was the cause of, or contributed to the death of the deceased, was medical testimony. The testimony of Doctor Smith was that of the attending surgeon although he did not perform surgery in the case. It was on his testimony that the Commission decided to ignore the findings of the Medical Panel.

Inasmuch as this case involves a difficult, contra-verted medical question which should be resolved by or be considered by specialists in their fields, Plaintiffs contend that following the testimony of Doctor Smith that the medical aspects of this claim should again have been referred to the Medical Panel for its further consideration based upon the Panel's previous findings and examination as supplemented by the testimony of Doctor Silas S. Smith. It should again be recalled in this respect that Dr. L. Louis Schricker, Jr., a Panel member, was one of the attending physicians in the treatment of the deceased. He actually operated upon the deceased and is

a specialist in neurology and neurosurgery. He was one of the members of the panel which reported back to the Commission that they could neither affirm nor deny that the accident of March the 23rd, 1961 caused the death of William E. Dahle.

It is the Plaintiff's position that the Commission as a matter of law, was in error in not again referring the medical aspects of this claim to the medical panel, for its further consideration. Certainly the neurologist who operated upon Dahle, and the other specialists who composed the Panel should have been called upon by the Commission to evaluate the testimony of Doctor Smith, as to whether the medical evidence showed a brain laceration. Such a conclusion does not appear in the report of the Panel, even though the Panel included neurologists who should be best qualified to determine if there had been a laceration of the brain.

The medical panel concept for assistance to the Industrial Commission in the determining of the medical aspects of Workman's Compensation claims is distinctive with the State of Utah. As far as is known, no other state has adopted such procedure. There have been but few decisions of our Supreme Court in which the procedure involving the Medical Panel has been discussed. One of the few cases is *Burton vs. Industrial Commission* 13 Utah 2nd 353, 374 P. 2nd 439.

This court said at page 354 the following:

"As opposed to the evidence upon which Plaintiff relied, the Commission had before it the opinions of three members of the Medical Panel, together with the testimony of one of them, Dr.

L. D. Viko, a well-known heart specialist. The substance of their opinions was that Mr. Burton's coronary thrombosis was myocradial infarction was not caused by the exertion of his work on that morning. In its decision the Commission recited, 'We choose to believe the testimony of Dr. L. E. Viko, and the panel's report.' "

The *Burton* case is one in which the Industrial Commission relied on the testimony of the Medical Panel in the face of the testimony of the family doctor.

In two very recent cases decided by this court, *Shelton vs. Industrial Commission*, No. 9828, June 5, 1963 Utah, 382 P2d 207, and *Joseph Pintar vs. The Industrial Commission of Utah and Columbia Steel Division*, June 17, 1963 Utah 382 P2d 414, this Court affirmed the decision of the Industrial Commission when the Commission in each case had relied on the findings of the Medical Panel. This was done in spite of contrary testimony by the attending doctor.

Plaintiffs do not take the position that the Commission should in all cases rely on the findings and conclusions of the Medical Panel. However, in this case now before the Court Plaintiffs believe that the Commission's action was arbitrary and capricious in not again referring the medical problem to the Panel for its further consideration in the light of Doctor Smith's testimony.

CONCLUSION

For the foregoing reasons, we believe that the findings and conclusions of the Industrial Commission are in

error as a matter of law, and that the Order of the Commission should be set aside.

Respectfully submitted,

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